Supreme Court of the United States

OCTOBER TERM, 1944.

No. 393

GEORGE PAPE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

George Pape, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on August 7, 1944.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (Clark and Swan, Circuit

Judges, affirming conviction, L. Hand, Circuit Judge, dissenting) is not as yet reported.

JURISDICTION.

The order for mandate of the United States Circuit Court of Appeals for the Second Circuit was entered August 7, 1944 (R. 362). The statutory provision believed to sustain the jurisdiction of this Court is § 240 (a) of the Judicial Code as amended. See also Rule XIII of the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934. Excluding Sundays (Aug. 13-20-27; Sept. 3-10) time for filing the petition extends to Sept. 11, 1944.

QUESTIONS PRESENTED.

1. Can a United States District Court, without committing error, submit and leave to a trial jury, an alternative theory, that the evidence did not justify, where one is being tried for a violation of Title 18, Section 398 United States Code?

2. Do the Federal Courts in the trial of the criminal case compel an attorney for defendant to testify to confidential and privileged communications?

STATUTE INVOLVED.

Title 18, Section 398 of the United States Code, provides as follows:

> "§ 398: Transportation of woman or girl for immoral purposes, or procuring ticket. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purposes of prostitution or debauchery, or for any other immoral purpose. * * *

shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."

STATEMENT.

Petitioner was indicted in the United States District Court for the Southern District of New York, for an alleged violation of Title 18, United States Code, Section 398; was convicted and sentenced; the judgment was affirmed by the Court below, Circuit Judge L. Hand dissenting.

Petitioner, a resident of New York City, had known a woman named Barbara Jorman for many months, who was the woman alleged in the indictment to have been transported by automobile from New York City to Washington, District of Columbia on or about July 11, 1942 "for the purpose of prostitution, debauchery and other immoral purposes". The so-called victim was taken to jail in Washington by a policeman, no charges were filed against her and she was released; some few weeks later picked up again by a policeman, no charges and again released.

The "victim", the woman named in the indictment, after the petitioner was arrested April 26, 1943 (R. 255) by a Federal Bureau of Investigation Agent in his hotel in New York City without a warrant, almost a year after the alleged offense, was placed under bond by the government as a material witness. During the course of the six day trial of the petitioner, the material witness was in constant attendance of the Court, the district attorney paraded before the jury no fewer than a score of witnesses to identify her; as having seen her with the petitioner; some of her bad practices and her association with some women who practiced a profession as old as the ages; she was held as a material witness and the person who could prove the alleged crime and assist the jury in arriving at a proper

verdict but was not called by the prosecutor. There was no direct testimony that the petitioner was guilty of the crime charged, other than from sources not worthy of belief; (R. 175), such as the testimony of a self-confessed criminal who had his sentence of two years cut down to ten months, released June 10, 1943 and testifying in the case under discussion, the first part of August 1943; a witness forty-four years of age, who under his own testimony (R. 185) admitted he had lived a life of crime for ten years. The petitioner properly requested the Court to call the material witness but this request was refused (R. 310) which refusal was an abuse of the Court's discretion it is contended. Court in his charge to jury (R. 321) referred to her as a witness.

The prosecution called as a witness an attorney of Washington who petitioner had consulted and employed and who assisted in the release of the woman in the case (R. 216), when she was taken in custody by a Washington police officer. There is a great deal of testimony to the effect that the woman was released in the custody of the petitioner's attorney, but such "custody" is foreign to any principles of criminal law. The testimony of this lawyer witness was strenuously objected to by the petitioner, the trial Court ruled one way, then changed after insistence by the prosecutor that such testimony was proper and apparently felt as if it were essential and necessary to complete a chain of circumstantial evidence to convict the petitioner. The petitioner's attorney who, as claimed, was a privileged witness and should not have been compelled to testify against his client in matters undoubtedly considered very material by the jury, placed the petitioner in Washington at a time that was material and in a Packard automobile as alleged as the means of transportation; which testimony was necessary to fortify the testimony of the hotel clerk Meridith who was considerably confused as shown on cross examination (R. 96).

Agent Rumans of the Federal Bureau of Investigation was by the Court permitted to testify over the objections of the petitioner to certain things alleged to have been said by the petitioner (R. 254-255); this testimony is not corroborated, although the witness (R. 276) stated "A. We questioned him, the *agents* and myself questioned him." The petitioner was picked up at his apartment at 11 o'clock, held in custody by the agent in the Federal Building on the 29th floor until 4:30 o'clock in the afternoon when he was arraigned. This testimony should not have been admitted in evidence, confusing as it is, undoubtedly was taken into consideration with great weight by the jury.

Considerable testimony was offered and received in evidence that the "victim" had been seen in a hotel of questionable character in Saratoga Springs, New York (R. 237) August, 1941, a year before the alleged crime as charged in the indictment; also petitioner had dinner there one night; testimony that was undoubtedly prejudicial to the defense of the petitioner but entirely remote and foreign to the charge of which he stands convicted; which conviction is based mostly upon such prejudicial testimony and a weaving of circumstances that injured him in the minds of the jury, but failed to prove the offense as charged (R. 230) (R. 247).

A Packard car operated by the petitioner obtained a considerable amount of attention when the government produced witnesses relative to the purchase of the same, servicing of the same, seeing baggage put in the car at times, seeing it parked where petitioner lived in New York, but without further proof the jury should not be permitted to consider it a "robot" machine loaded in New York and ending up in Washington later, as there is no proof the petitioner drove the same to Washington.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred, as follows:

1. In sustaining the judgment of conviction.

2. In failing to reverse the judgment of conviction for failure of the District Court to grant the motion for directed verdict on grounds of insufficient evidence (R. 309).

3. In failing to reverse the judgment of the District Court for its error in overruling defendant's motion in arrest of judgment (R. 340).

4. In failing to reverse the judgment of the District Court for its error in admitting improper evidence.

5. In failing to reverse the judgment of the District Court for its error in improperly instructing the jury (R. 332).

6. In failing to reverse the judgment of the District Court in a papable abuse of discretion in failing to call the material witness to testify before the Court and jury.

7. In failing to reverse the judgment of the District Court in permitting Government agents' prejudicial statements taken from petitioner in their custody and before arraignment.

REASONS FOR GRANTING THE WRIT.

I.

Can a United States District Court, without committing error, submit and leave to a trial jury, an alternative theory, that the evidence did not justify, where one is being tried for a violation of Title 18, Section 398 United States Code?

Petitioner is not guilty as charged and now stands convicted. The facts are set out in the statement, *ante*. Even if the theory upon which this prosecution proceeded

were proven correct, the trial Court erred in its alternative theory as submitted to the jury. The purpose of the testimony of the police Sergeant Blickt of Washington; other witnesses from Washington and the Homestead Hotel in Saratoga Springs, New York, was that the woman was a prostitute and the petitioner transported her for the purposes of prostitution and not that the petitioner unlawfully cohabited with the "victim" in New York State or Washington. In submitting the case to the jury, the Court said:

> "Any immoral purpose, in this case, would include, not merely that the woman when she had been transported to Washington, if you find that she was so transported, should enter into sexual relations for a consideration promiscuously with men. The immoral purpose stated in the statute would cover also the interest of the person transporting or causing her to be transported to have himself immoral relations with her, such as sexual relations, if the parties were not legally married. * * * And as I told you, those immoral practices might include sexual relations with the person transporting her, if that person was not legally married to the woman." (R. 323).

Petitioner's counsel took exception to that part of the Court's instruction upon the ground that the case was tried as one exclusively involving commercialized vice and that no claim had ever been advanced that petitioner intended to himself engage in any immoral relationship with her.

The following colloquy then ensued:

> "The Court: I think the law is clear that the immoral purpose may include unlawful and illegal sexual relationship between the defendant transporting the woman, and the woman herself. That is what I have told the jury.
>
> "Mr. Singer: But your Honor may not submit the case on a theory not taken by the Government during the trial.

> "I except to the refusal of the Court to charge request No. 9.
> "The Court: That is covered in the general charge." (R. 332).

Petitioner's request No. 9 was pertinent to the issues presented, and it was error to refuse to so instruct the jury:

> "9. Guilt may not be found merely because the defendant and Miss Jorman were registered at a hotel in Washington as man and wife. It is still necessary for the Government to prove beyond a reasonable doubt that the defendant intended to have Miss Jorman commit acts of prostitution in Washington and that the transportation was for that purpose." (R. 317).

The Court advanced a new theory, in its charge; no such proof was attempted, nor was there anything before the jury that would justify a finding that they were not legally married. Nor was there any proof offered to the effect that petitioner had actually occupied the room in Houston Hotel in Washington, and there engaged in any immoral practice. In fact, Sergeant Blicht's testimony is indicative of the contrary since he found no man's clothing in the room (R. 163).

In *Pincolini* v. *United States,* 9 Cir., 295 Fed. 468, the Court declared (at p. 470):

> "In charging the jury the Court should not assume facts in controversy; if the testimony is stated, it should be stated with accuracy; that which makes in favor of the party should be stated as well as that which makes against him; *theories should not be advanced or conclusions drawn that are not warranted by the testimony;* the charge should not be argumentative or one-sided; and the Court should not step out of the province of judge into that of the advocate. *Starr* v. *United States,* 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 814, and cases there cited." (Italics ours)

The Supreme Court, in *United States* v. *Breitling,* 20 How. 252, 254, in an opinion by Mr. Chief Justice Taney, said:

> "It is *clearly error in a Court to charge* a jury upon a *supposed or conjectural* state of facts of which *no evidence has been offered.* The instruction pre-supposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the Court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony." (Italics ours)

The practice of the trial Court was condemned by this Court in an opinion by Mr. Chief Justice Hughes, in *Quercia* v. *United States,* 289 U. S. 466, wherein it was quoted at page 470, "Deductions and theories not warranted by the evidence should be studiously avoided."

The alternative theory advanced by the Court was unfounded and unwarranted by the evidence, and neither attorney tried the case upon such a theory. The opinion of the Circuit Court of Appeals (R. 365) referring to civil procedure under no circumstances is the law of the land in criminal cases, and is not in accord with opinions in other Circuits or the law as laid down by this Court. Circuit Judge Hand, dissenting in this case, observed the error of the trial Court and the injustice done the petitioner, when he states (R. 370):

> "Moreover, I do not believe the evidence justified a conviction on the alternative theory which the judge left to the jury. * * * Only the purpose for which he took her from New York to Washington, was relevant; and, while it is conceivable that the trip may have been in part actuated by the purpose of continuing to enjoy her as he had been doing, *that seems to*

me too doubtful to justify a conviction—the merest speculation.'' (Italics ours)

Regardless of the nature of the alleged offense, as charged, this petitioner was entitled to be tried as any other defendant in a criminal case; he was not; this petition for Writ of Certiorari should be allowed. The law as laid down by this Court is as announced by Circuit Judge L. Hand in the dissenting opinion. If the majority opinion in the Court below is allowed to stand in this case, it is in conflict with the law announced by the Ninth Circuit as well as the Supreme Court of the United States.

II.

Do the Federal Courts in the trial of a criminal case compel an attorney for defendant to testify to confidential and privileged communications?

M. Edward Buckley, an attorney admitted to practice in the District of Columbia, having been called by the Government as a witness, advised the Court, in the absence of the jury, that on or about July 15th, 1942, he was retained by petitioner to represent himself and the material witness, and that, therefore, a question of confidential communication between attorney and client was involved in the matters on which he was to be examined by the Government. The Court found that the relationship of attorney and client between the witness and petitioner had been established, and ruled that the witness would not be permitted to be questioned as to conversations with petitioner (169-172). Notwithstanding the urgings of counsel for petitioner that, under the circumstances, the witness was required to be excused without further questioning (172), the Court directed, over the objection and exception of petitioner, that the witness testify as to who retained him to appear for Barbara Pearson in Washington on or about July 11, 1942, and who paid his fee for

acting as her attorney, and to identify both Barbara Pearson and the person who retained him and paid his fee for representing her (210-211). In accordance with the ruling of the Court the witness then testified, in the presence of the jury, as to the details concerning his retention and identified the material witness as Barbara Pearson and petitioner as the person who retained him and paid his fee (214-216).

The case against petitioner was predicated upon circumstantial evidence of such character that the testimony of Buckley was its strongest point. The record was devoid of any evidence of either transportation by petitioner or the vital element of intent. The government was, therefore, most anxious to place before the jury Buckley's testimony concerning the circumstances and details of his retainer by petitioner so that the jury would know that petitioner and the material witness were in Washington at the same time; that the material witness was in custody of the police, and that petitioner had retained and paid an attorney to represent her, thereby establishing criminality on the part of the petitioner by inference. This was definitely violative of petitioners privilege against self-incrimination and the confidential relationship of attorney and client.

With the exception of those cases in which an attorney was consulted by a client for advice that would serve him in the commission of a fraud or a breach of law, no case has been found where an attorney was compelled to testify in a *criminal case in which his client was the defendant*, concerning the circumstances and purposes of his being retained, or the matters therein involved where those matters would affect the interest of the client.

The Court below (R. 367) and Trial Court, in making its ruling, relied on *People ex rel. Vogelstein* v. *Warden of the County Jail*, 150 Misc. 714, which, in turn, was predicated upon *United States* v. *Lee*, 107 Fed. 702. Both cases

were concerned with the refusal of attorneys, in the course of *grand jury investigations,* to disclose the names of their clients where it appeared that they had represented persons in the State and Federal Courts respectively, by whom they had not been retained. In each instance the attorneys claimed that privileged communications were involved. In directing the attorneys to disclose the names of their clients the Courts held that an attorney may not state that the relationship of attorney and client existed "and then leave that client mysterious, unknown and undefined. The Court has a right to know that the client whose secret is treasured is actual flesh and blood, and demand his identification, for the purpose, at least, of testing the statement which has been made by the attorney who places before him the shield of this privilege." *United States* v. *Lee, supra,* at p. 704.

Petitioner does not take issue with either the *Vogelstein* or *Lee* cases insofar as they hold that the relationship of attorney and client must be established before the claim of privilege may be asserted, but respectfully submits that neither case is authority for the proposition here involved and that even under those decisions the ruling of the Court in the case at Bar was erroneous and prejudicial.

The situation in the case at Bar was not analogous to those presented in the *Lee* and *Vogelstein* cases. There the "clients" were unknown and unnamed, and the disclosure was directed in order to ascertain whether or not bonafide relationship of attorney and client had been established. Here the Court had been fully informed by Buckley as to all the details and circumstances of his being retained by petitioner, and, as a result, the Court was satisfied and found that the relationship of attorney and client had been adequately established (170-173, 210-211). The question presented in the *Vogelstein* and *Lee* cases was not, therefore, here involved, and no purpose could be served by compelling the witness to repeat all the de-

tails of his retainer before the jury unless it was to prejudice petitioner in their minds by permitting incriminating evidence to be improperly presented to them.

The purpose of examining Buckley in the absence of the jury was to determine whether a bona fide relationship of attorney and client existed, and to keep from it any information concerning that relationship that might in any manner, tend to prejudice or incriminate petitioner. When that relationship, which was a question of law and not one of fact to be determined by the jury, was found by the Court to be a valid one, the witness was required to be excused.

The *Lee* and *Vogelstein* cases were both concerned with grand jury investigations and not criminal trials in which the "clients" were defendants, and where proof of the relationship of attorney and client might incriminate the "client". The Court, in the *Vogelstein* case, indicated that had that been the situation there a different conclusion would have been reached when it held that the attorney could not urge that disclosure of the relationship might tend to incriminate the client since "only the witness or party himself may urge that immunity" (p. 176). Petitioner here objected to any disclosure by Buckley and urged that he be excused without questioning (172, 210, 211).

It cannot be disputed that notwithstanding petitioner's objections, Buckley was compelled to give testimony that tended to incriminate petitioner on the very charge for which he was on trial. The effect of Buckley's testimony was to establish *that petitioner was in Washington at the same time as the material witness;* that he knew of her arrest and conduct there; and by his retainer of Buckley for and on her behalf to raise an inference that he was a beneficiary of her activities, thereby permitting the jury to presume criminality on the part of petitioner. Without this testimony no case could have been made out against

petitioner. The practice here indulged in by the Court has never found sanction in the law. In *Corpus Juris* (Vol. 70, Section 562) the law is stated to the contrary:

> "Thus the attorney will not be required to disclose the identity of his client except in an action or proceeding in which he purports to represent the client, and so the name of the client will be considered privileged matter where the circumstances of the case are such that the name of the client is material only for the purpose of showing an acknowledgment of guilt on the part of such client on account of the very offenses on account of which the attorney was employed, * * * ."

In the Matter of Shawmut Mining Co., 94 App. Div. 156, in which it was sought to have an attorney disclose the identity of his client in order to connect him with certain transactions, the Court held (p. 163):

> "We feel sure that under such conditions no case has ever yet gone to the length of compelling an attorney, at the instance of a hostile litigant, to disclose not only his retainer, but the nature of the transactions to which it related, when such information could be made the basis of a suit against his client. Upon the other hand we believe that a refusal to compel such disclosures is sustained by the principles laid down in Carnes *v.* Platt, 36 N. Y. Super. Ct. 361, 362, affirmed 59 N. Y. 405; Williams *v.* Fitch, 18 N. Y. 546, 551; Cherac *v.* Reinicker, 11 Wheat. 280, 6 L. Ed. 474."

See also: *Matter of Malcolm*, 129 App. Div. 226;
Matter of Traynor, 146 App. Div. 117;
Hyman v. *Corgill Realty Co.*, 164 App. Div. 140.

In *Ex Parte McDonough*, 149 P. 566, 170 Cal. 230, it was held that an attorney who had been employed by certain clients to represent them in matters connected with the investigation of election frauds, and who appeared to

defend three other individuals who were indicted, and to put up bail for one of the indicted men, could not be compelled to state to the grand jury the names of the clients who employed him to represent the indicted men and who furnished the cash for the bail.

The Court, in the case at Bar, in compelling Buckley to testify as to who retained him and paid his fee for appearing for Barbara Pearson in Washington on or about July 11, 1942, and to identify both Barbara Pearson and the person who retained him and paid the fee for representing Barbara Pearson (210), not only virtually destroyed the integrity of the privilege existing between attorney and client, but completely ignored the restrictions and admonitions of the Court in *United States* v. *Lee, supra.* In that case it was held, even under the circumstances there involved, the attorney should not be required to testify as to who paid his fee, the interest of the client in the litigation, and whether the client had retained him to protect his own interests thus limiting the testimony of the attorney to the name and address of his client. The Court cautioned the grand jury as to the use to which such information was to be put "lest the Court should appear to be unjust in compelling an attorney to reveal the identity" of his client. *U. S.* v. *Lee, supra,* pp. 704-5.

The questions propounded of the witness Buckley undoubtedly called for the disclosure of a privileged communication. The rule as to privileged communications is thus stated by Greenleaf (Evidence, 15th ed.), par. 237:

> "And in the first place in regard to professional communications, the reason of public policy, which excludes them, applies solely, as we shall presently show, to those between a client and his legal adviser; and the rule is clear and well settled, that the confidential counselor, solicitor, or attorney of the party can not be compelled to disclose papers delivered, or

communications made to him, or letters or entries made by him, in that capacity."

In the present case the question is not as to the existence or meaning of the rule but as to its application. This is well brought out in the case of *Chirac* v. *Reinicker,* 11 Wheat., 280. In that case the witness was asked the following question: "Were you retained at any time as attorney or counselor, to conduct the ejectment suit above mentioned on the part of the defendant, for the benefit of the said George Reinicker as landlord of those premises?" The Supreme Court, by Justice Story, held that the question was improper as calling for the disclosure of professional confidence. At page 294 the Court said:

> "The general rule is not disputed, that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purpose of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent. The real dispute in this case is, whether the question did involve the disclosure of professional confidence. If the question had stopped at the inquiry whether the witnesses were employed by Reinicker, as counsel, to conduct the ejectment suit, it would deserve consideration, whether it could be universally affirmed that it involved any breach of professional confidence. The fact is preliminary in its own nature, and establishes only the existence of the relation of client and counsel, and therefore might not necessarily involve the disclosure of any communication arising from that relation after it was created. But the question goes further. It asks, not only whether the witnesses were employed, but whether they were employed by Reinicker to conduct the ejectment for him, as landlord of the premises. We are all of opinion that the question, in this form, does involve a disclosure of confidential communications."

Circuit Judge L. Hand, in the case below, in his dissenting opinion stated: (R. 370)

> "On the other hand I attach no importance to the fact that he retained him in both capacities at the same time; the case stands as it would, if he had retained him for himself first. Yet, if he had done that, when he told him to appear for her, I think it was a communication between attorney and client, a step in his own defense; it may have been also a step in hers but that. I submit, is irrelevant. That direction to his own attorney in his own interest was as much a privileged communication as any direction would have been, made in the course of preparing for a trial; as much for example, as to tell one's attorney to interview a witness."

The ruling of the Court below on the admissibility of the testimony of Mr. Buckley was error. It violated a basic and fundmental rule that an attorney may not testify against his client and divulge confidential and privileged communications.

CONCLUSION.

This petition does not attempt to present to this Court the question wherein the Court below under existing circumstances abused its discretion and committed error in failing to call the material witness. Neither does it attempt to show wherein the trial Court erred in permitting the testimony of the Federal Bureau of Investigation Agent, contrary to the law laid down by this Court in *United States* v. *McNabb,* 318 U. S. 332, and *United States* v. *Mitchell,* 60 S. Ct. 896. The two questions submitted, are considered sufficient, to believe this Court will grant the petition for a writ of certiorari. The writ should be granted.

Respectfully submitted,

Roy St. Lewis,
Counsel for Petitioner.